Supreme Court, U.S.
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No. 92-70

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES STEEL CORPORATION,

Petitioner,

v.

ANDREW CARTER, A MINOR BY HIS PARENT AND NATURAL GUARDIAN, DONALD CARTER AND DONALD CARTER IN HIS OWN RIGHT,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

REPLY BRIEF

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REPLY BRIEF

I. FACTUAL MISSTATEMENTS BY RESPONDENT

A number of misstatements appear in the Brief in Opposition to Petition for Writ of Certiorari, filed by Respondent in the instant case, which relate to facts critical to this Court's determination of the certiorari Petition. These will be addressed in summary fashion, in order to ensure that the Court is aware of the accurate facts as reflected in the Appendix.

1. Respondents have stated in several portions of their Brief that it was counsel for U.S. Steel who recommended that the trial judge question each juror *after* the verdict had been reached, and generally "suggested the procedure adopted by the trial court" with respect to the jury's improper exposure to media reports. (Brief in Opposition at 3, 12). This is false. The record makes clear that counsel for U.S. Steel requested that the jury be polled *immediately* upon discovery of the prejudicial news account. (App. 115-117). Indeed, the record indicates that it was Respondents' attorney who argued that the jury could not be interrupted because they had commenced deliberations, and urged the judge to postpone the inquiry. (App. 116). Moreover, the record is abundantly clear that it was the trial judge who ultimately dictated the procedure to be followed; not counsel for U.S. Steel. (App. 115-119).

2. Respondents state that the jury "unanimously" found USX liable. (Brief in Opposition at 4). This is incorrect, as discussed at length in the Petition for Writ of Certiorari at p. 8 and n.3.[1]

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[1] To suggest that the jurors never made explicit on which "issue" they had changed their minds is insulting to the intelligence of all concerned. The record clearly reflects that the jurors in question changed their votes as to liability, and expressed this fact to the trial judge. *Id.*

3. Respondents incorrectly state that U.S. Steel made a "tactical" decision to refrain from requesting cautionary instructions. (Brief in Opposition at 3, 12). In support of this proposition Respondents cite a source not in the record, and not in the Appendix, in violation of Rules 15 and 24 of this Court. In fact, no such "tactical" decision was made. The trial court made clear what procedure would be followed with respect to the jury's exposure to media reports, and clearly indicated that cautionary instructions over and above his general instructions would serve no useful purpose. (App. 115-119). Moreover, his conclusion proved to be accurate, since the jurors themselves indicated that they understood they were not to consider extraneous information from the media, yet did so despite the judge's instructions. (App. 121-138).

4. Respondents represent that counsel for U.S. Steel failed to "promptly notify the trial court" when he learned of the prejudicial publicity. (Brief in Opposition at 12). This is not true. The record is unequivocal that counsel immediately raised the issue of the prejudicial newspaper report and news broadcast as soon as he learned of them. (App. 112-115). No court at any level in these proceedings has ever questioned this fact; it is incredible that Respondents now seek to inject such a misstatement into the record.

5. Respondents state that the information concerning the subsequent accident at the U.S. Steel facility (in which Orlando Dugley was killed by electrocution) was "admissible under Pennsylvania law." (Brief in Opposition at 18-19). This is inaccurate and misleading. Such evidence was specifically deemed inadmissible in this case. The trial judge explicitly found that evidence of the Dudley accident would be prejudicial to the jury, and excluded such evidence at trial. *See* Petition for Writ of Certiorari at 9; App. at 85; 107-111.

6. Respondents suggest that the news account was not prejudicial because the jury was already aware of everything portrayed in the television broadcast, from its

view of the accident site. (Brief in Opposition at 18). This simply is not true. As the trial judge was acutely aware – in rejecting a similar argument at the post-trial stage – the words and images contained in the WTAE newscast were saturated with potentially inflammatory information. First, it informed the jury in graphic fashion that a boy had been killed on a virtually identical tower. Second, it improperly reinforced in the jurors' minds that U.S. Steel had taken no corrective measures at the Carrie Furnace site to prevent future accidents, a fact which the trial judge knew to be false.[2]

Respondents' mischaracterizations of the factual record, although tolerated with a certain impunity in the lower courts, cannot be countenanced at this level. To the extent that the above facts are critical to this Courts' proper determination as to whether certiorari is appropriate, it is essential that the facts of record be accurately conveyed.

II. "ADEQUATE AND INDEPENDENT STATE GROUNDS" ISSUE

Respondents argue at length that the Petition for Writ of Certiorari should be denied because the judgment rests upon "adequate and independent state law grounds." (Brief in Opposition at 9-13). This argument is misplaced, and overlooks the leading decision of this Court on the subject.

First, what two Justices of the Pennsylvania Supreme Court off-handedly mention as "factors" bolstering the majority opinion, hardly constitute "adequate and independent state grounds" sufficient to strip this Court of jurisdiction. The first additional "factor" cited – that an employee of USX had spoken with a newspaper reporter

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[2] The trial judge was aware that U.S. Steel had constructed metal barriers at the base of the towers, but these had been removed by Orlando Dudley before he was electrocuted. This fact had been withheld from the jury at the time they viewed the site. Thus, the television broadcast only exacerbated the situation.

concerning an earlier, innocuous news account – is wholly irrelevant. As made clear by the jurors and the trial judge, the prejudice in this case flowed from the *television broadcast* appearing on WTAE TV; not the newspaper account.

The second additional "factor" mentioned by the same two Justices – that U.S. Steel was somehow "estopped" from raising the prejudicial impact of the television broadcast upon the jury, because the trial judge had determined to "let the matter roll" – is likewise irrelevant. First, as the dissent points out, counsel for U.S. Steel had no choice. (App. 22-23). Once the trial judge issued his ruling, there was nothing further that counsel for U.S. Steel could (or should) have done. *Id.* Second, the trial judge clearly did not view the issue as being "waived," since he went on to conduct an inquiry and find that the jury panel was unconstitutionally prejudiced.

Finally, and most significantly, the issue of "waiver" or "estoppel" is a red herring. The trial judge established a procedure to determine if the jury had been prejudiced; he found a violation of due process; he ordered a new trial. Such a constitutional violation as found by the trier of fact cannot be erased by a declaration that defendant somehow "should have done more." At the point where the judge elected to follow a particular procedure based upon his own best judgment, the conduct of counsel for U.S. Steel became legally irrelevant. The trial court found that the jury panel was tainted – through his own inquiry designed to ensure that a fair trial had been conducted – and this fact is clearly emblazoned in the record. No postscript by two of the seven Justices of the Pennsylvania Supreme Court can now change that fact. A mere assertion that U.S. Steel "might have done something differently," cannot eliminate the federal constitutional violation found by the trial judge, or shield it from review by this Court.

In support of its "adequate and independent state law grounds" argument, Respondents cite *Murdoch v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874) and *Herb v.*

Pitcairn, 324 U.S. 117 (1945). These early cases stand for the proposition, generally, that this Court may not reach a federal issue where the decision of the state court stands on an independent foundation supported by its own state law.

Respondents, however, fail to cite *Michigan v. Long*, 463 U.S. 1032 (1983), the most recent pronouncement by this Court which significantly altered the modern jurisprudence surrounding the adequate and independent state grounds doctrine. *Murdoch, Herb*, and cases of that genre essentially *presumed* that a state court rested its decision upon state law, whenever a doubt existed. *See, generally*, Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977 (1985). However, *Michigan v. Long* essentially switched this presumption, and now requires that state court (in the words of Justice O'Connor) make a "plain statement" that the judgment relies exclusively upon independent state grounds. *Id.* at 1040-1041. Otherwise, the Supreme Court may reasonably conclude that it is authorized to exercise federal jurisdiction, particularly where mixed references to federal and state law exist. *Id.* at 1041-1042.

In the instant case (as discussed *infra*), the Pennsylvania courts continuously discussed the issues of "prejudice" and impartiality" as if they were mixed questions of state and federal law. Under Pennsylvania case-law, the right to an "impartial jury" has consistently been located in intermingled references to the Pennsylvania Constitution and the Due Process Clause of the Fourteenth Amendment, implicating both of these provisions. *See e.g., Commonwealth v. Brown*, 231 Pa.Super. 431, 435, 332 A.2d 828, 830-831 (1974); *Commonwealth v. Williams*, 262 Pa.Super. 508, 396 A.2d 1286 (1978), *rev'd on other grounds*, 494 Pa. 496, 431 A.2d 964 (1981); *Commonwealth v. Stewart*, 449 Pa. 50, 52, 295 A.2d 303, 303-306 (1972), *cert. denied*, 417 U.S. 949 (1974).

In the case at bar, the Pennsylvania Supreme Court derived its test regarding the "prejudicial" nature of the

television news account from both state and federal sources. (App. 11). Significantly, the Pennsylvania Supreme Court relied upon a federal decision – *Owen v. Duckworth*, 727 F.2d 643 (7th Cir. 1984) – in crafting its definition of "prejudice." *Id. Owen* is a leading federal decision from the 7th Circuit dealing with the right to an impartial jury, which rests squarely upon the Due Process Clause of the 14th Amendment. *See Owen*, 727 F.2d at 645.

In sum, the "adequate and independent state grounds" doctrine does nothing to militate against granting certiorari in the instant case. To the contrary, the state "grounds" relied upon by two Justices of the Pennsylvania Court were tangential at best. Moreover, even if anything approaching a substantial state question was addressed, any such question was inextricably intertwined with federal law.

III. THE FEDERAL DUE PROCESS ISSUE WAS CLEARLY RAISED BELOW

Respondents also assert that certiorari must be denied because the federal due process issue was never presented "to any state court at any stage in the proceeding." (Brief in Opposition at 15). This is perhaps the most serious misstatement of the Brief. Indeed, it presents an additional reason weighing in favor of this Court granting certiorari. If any doubt truly exists on this matter, which Petitioner disputes, this Court must clarify the federal law which governs the specificity with which a party must preserve a federal constitutional issue.

It has long been held that this Court's jurisdiction "does not depend on citation to book and verse." *Eddings v. Oklahoma*, 455 U.S. 104, 113-114 n.9 (1982). So long as the record as a whole shows expressly or by clear intendment that the federal claim was brought to the attention of the state court with fair precision, "the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). *See also,*

STERN, GRESSMAN & SHAPIRO, SUPREME COURT PRACTICE 146 (6th Ed. 1986).

The lower courts in this case originally dealt with the due process issue in terms of "prejudice" and lack of "impartiality". These concepts are inextricably tied up (in Pennsylvania law) with the guaranty of due process under the Fourteenth Amendment. *See, e.g., Brown, Williams* and *Stewart, supra.* Moreover, Petitioner explicitly raised the constitutional claim in terms of an "impermissible denial of due process" (App. 92-99) at the first opportunity available; to wit, when the Pennsylvania Supreme Court by-passed the ruling of the trial court and stripped U.S. Steel of the right to an impartial jury trial. *Id.* At that critical point, U.S. Steel immediately raised the federal due process issue in its application for re-argument.

A number of decisions of this Court have approved of such broadly-worded Constitutional language, holding it to be adequate to preserve a federal question. *See, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 159 n.5 (1980) (generalized "due process" arguments sufficient); *Taylor v. Kentucky,* 436 U.S. 478, 482 n.10 (1978) (invoking "fundamental principles of judicial fair play" should have "sufficed to alert the trial judge to petitioner's reliance on due process principles"); *Braniff Airways v. Nebraska State Board,* 347 U.S. 590, 598-99 (1954), *reh'g denied,* 348 U.S. 852 (1954) ("(t)hough inexplicit, we consider the due process issue within the clear intendment of his contention and hold such issue sufficiently presented"); *Bryant v. Zimmerman, supra,* 278 U.S. at 68 (asserting that the statute "deprived (petitioner) of his liberty without due process of law. . . . " was sufficient).

More importantly, this Court has made clear that where the federal constitutional question is created by an "unexpected decision" of the state supreme court, the petition for rehearing "constitutes the appellant's first and probably only chance to present the matter to that court." In such a situation as here, it is well accepted that the federal issue may properly be raised for the first time

in the petition for rehearing. STERN, GRESSMAN & SHAPIRO, *supra* at 156; *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-78 (1930); *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74, 85-86 n.9 (1980) (Rehnquist, J.). The federal question will be deemed timely raised and will justify the exercise of the Supreme Court's jurisdiction, even though the petition for rehearing is summarily denied. STERN, GRESSMAN & SHAPIRO, *supra*. at 156.

In the instant case, the federal due process issue was raised explicitly by Petitioner as soon as the Pennsylvania Supreme Court issued its opinion denying due process. Moreover, the federal due process issue was already in the case – albeit expressed in generalized terms – to the extent that the lower Pennsylvania courts had addressed the "impartiality" and "prejudice" concepts, which by tradition have merged federal due process notions into the fabric of Pennsylvania law.

To the extent that there is any serious question concerning the proper raising of the federal due process issue, Petitioner vigorously contends that this issue provides yet a second reason for this Court to grant certiorari. Although a sprinkling of early 20th century cases suggest that the Court must look with a harsh eye at any Petition in which the applicable federal provision has not been cited by chapter and verse below, this is clearly not the direction of more recent pronouncements of this Court. Where any ambiguity exists, Petitioner believes that *Michigan v. Long* now dictates that the presumption must be made in favor of preserving the federal question and permitting review. To the extent that this issue regarding the Court's jurisdiction may require clarification, Petition asserts that certiorari is doubly appropriate.

IV. MISCELLANEOUS ISSUES

Respondent ultimately seeks to justify the denial of federal due process in this case by arguing that the Pennsylvania Supreme Court was simply exercising its "supervisory authority" over the trial court, when it overturned

the lower court's finding of prejudice. The Pennsylvania Supreme Court, according to Respondents, simply decided this matter as a "question of law." (Brief in Opposition at 16).

Such an analysis misses the mark. This Court has made clear that a state trial judge's determination as to prejudice is a factual finding, entitled to great deference. *Rushen v. Spain*, 464 U.S. 114, 120 (1983), *reh'g denied*, 465 U.S. 1055 (1984); *Patton v. Yount*, 467 U.S. 1025, 1037 n.12 (1984). The trial judge and jury are the "closest to the scene of events," which is an "undeniable advantage over any appellate tribunal." STERN, GRESSMAN & SHAPIRO, *supra* at 181. Where a federal right has been denied as a result of a finding by the state court unsupported by the record, this Court has not hesitated, and should not hesitate, to exercise its power to review the factual record. *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927).

If this Court is to meet its Constitutional responsibility, it cannot permit itself to be "completely bound by state court determination[s] of an issue essential to [a] decision of a claim of federal right, [or] else federal law could be frustrated by distorted fact finding." *Stein v. New York*, 346 U.S. 156, 181 (1953), *overruled on other grounds*, 378 U.S. 368, 391 (1964).

Respondent is forced to argue, in the end, that Petitioner received due process in this case because "(i)t was permitted to conduct a post-trial interrogation to discover whether any juror was aware of the publicity." (Brief in Opposition at 16). This analysis is quite ironic. Because it is by virtue of precisely this sort of post-trial inquiry that the jurors, the trial court, and the Superior Court all agreed that Petitioner was unconstitutionally prejudiced, and that a new trial was mandated. Part of the process which is now due U.S. Steel is that the *ad hoc* appellate fact-finding engaged in by the Pennsylvania Supreme Court – which stripped Petitioner of its 14th Amendment rights – must be subject to review by this Court, and overturned if it does not comport with the United States Constitution.

V. CONCLUSION

For all of the reasons set forth above, Petitioner U.S. Steel respectfully submits that two distinct reasons now exist which justify this Court's granting certiorari with respect to Petition.

Respectfully submitted,

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